UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

VOLVO GROUP NORTH AMERICA, LLC	)	
	)	
Respondent,	)	
	)	
And	)	Case 15-CA-179071
	)	Case 15-CA-184912
	)	Case 15-CA-195183
Walter Evans,	)	Case 15-CA-204842
	)	
Charging Party	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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Now comes Volvo Group North America, LLC, Respondent herein ("Respondent" or "Volvo"), and files its Brief in Support of Exceptions to Administrative Law Judge's Decision [1] as follows:

STATEMENT OF CASE

This case arises out of a series of unfair labor practice charges filed against Respondent by Walter Evans ("Evans"), an individual, who was employed as a Warehouse Operator at the Company's Byhalia, Mississippi manufacturing facility. (GC-1). On April 30, 2018, the Regional Director for Region 15 issued a Third Consolidated Complaint alleging violations of Sections 8(a)(1), (3), (4), and (5) of the Act. (GC-1(ii)). Respondent filed a timely answer, denying the material allegations of that complaint and raising certain affirmative defenses. (GC-1(kk), 1(ll). A hearing was conducted in Memphis, Tennessee on July 30 and 31, August 1 and 2, and September 13, 2018, before Administrative Law Judge Sharon L. Steckler.

On April 29, 2019, Judge Steckler issued her decision. The Judge recommended dismissal of the Section 8(a)(4) allegations, the Section 8(a)(5) allegation, and the Section 8(a)(3) allegation regarding Evans' initial termination in May 2016. The Judge, however, declined to defer to a grievance settlement reached by the Company and the Union in which the parties agreed to rescind a 30-day suspension issued to Evans on May 3, 2016, for an alleged safety violation (dropping a

[1] Citations to record evidence will be provided using abbreviations and page or exhibit numbers for the references. References to the hearing transcript will be indicated with Tr. followed by the page number or numbers; references to the hearing exhibits will be indicated with Jt-, GC-, or R- followed by the number for Joint Exhibits, General Counsel Exhibits, and Respondent Exhibits respectively; references to the transcript and exhibits in the underlying arbitration record that is in evidence in its entirety in this record will be indicated with "Arb." and the page numbers or the arbitration transcript or arbitration exhibit abbreviations and numbers.

load of windshields) and to convert his subsequent termination for threatening and abusive conduct to a 30-day suspension. Based on her review of the record, the Judge recommended that the Board find that Respondent violated Sections 8(a)(3) and (1) by issuing Evans a written warning on March 23, 2016, suspending Evans on May 3, 2016, and terminating Evans on March 20, 2017. (JD 46: 4-10). Respondent now files exceptions to the Judge's decision and this supporting brief.

STATEMENT OF FACTS

A. Background

In 2014, Respondent opened a 1.2 million square foot Logistics Center in Byhalia, Mississippi. The employees from the phased-out Memphis Logistics Center were relocated to Byhalia and Respondent recognized UAW Local 2406 (which had represented the Memphis employees) as the exclusive bargaining representative of the employees. (R-4). The collective bargaining agreement (CBA) in effect at Memphis was renegotiated and extended until December 16, 2020. (Jt-1). It is undisputed that Respondent maintained certain published rules of conduct and that it generally followed a progressive discipline system for employees covered by the CBA. (GC-57).

Evans transferred from the Company's Logistics Center in Columbus, Ohio to Byhalia on May 11, 2015, as a Warehouse Operator. (Jt-3; R-4). During his Byhalia orientation Evans was provided a copy of the rules of conduct and the safety rules. (R-4; Arb. C-1 & 11). He was trained on the safe operation of a lift truck on May 12, 2015 and retrained in August 2016, when he returned to work following his initial termination. (Arb. C-6 &15).

B. Evans' Alleged Protected Activities

Evans testified to a litany of activities in which he engaged during the course of his employment. Without question, he was a chronic complainer who raised numerous issues, some

specific and others nonspecific, both with management and with the Union. Indeed, it appears from his testimony that his issues with the Union exceeded those that he had with Respondent. In general, Evans did not believe that the Union was responsive to his, as well as other employees', issues. (Tr. 482-483, 501). As was evident from his demeanor at the hearing, and as Judge Steckler found, Evans has a personality that does not necessarily endear himself to others. (JD 19: 28-38). Throughout the proceeding he sought to control the questioning of witnesses by the General Counsel, and came across at times as a "know-it-all" who was always right and whose problems were always the fault of someone other than himself.

Much of the difficulty in addressing the alleged unfair labor practices stems from the scatter gun approach taken by the General Counsel in regard to Evans' allegedly protected concerted activities. Thus, while he pinpoints certain alleged activities by Evans, the General Counsel also alleges that Evans raised a host of other complaints over the course of his employment, some specific and others of a more generalized nature. Indeed, there was no period of time in which Evans was not engaged in some type of activity. But as will be discussed, while some of these activities were protected by Section 7, others were not.

1. Filing of Unfair Labor Practice Charges

Prior to his final termination, Evans filed unfair labor practice charges on June 27, 2016; August 17, 2016; and September 23, 2016. These clearly constituted protected activities. However, the ALJ found no evidence of animus on the part of Respondent regarding the filing of these charges and recommended dismissal of the Section 8(a)(4) allegations. (JD 43: 36-50; 44: 1-15).

2. Filing of Grievances

Evans also filed numerous grievances. On July 6, 2015, he filed grievance 2015-10 regarding denial of overtime opportunities and the use of temporary employees. (Tr. 180-187; GC-

4). Evans testified that he and a group of third shift employees believed they had been denied overtime opportunities and that subsequently a conflict developed between the original grievants and the Union committeemen, Kerrick Adams and Chris Hudson. (Tr. 180; GC-4). Evans testified that Arthur Braggs, who was a regular (non-lead) employee at the time, was somehow included in the grievance and that Evans was told by the Union committeemen that the grievance was settled. However, the Union committeemen purportedly declined to show the settlement to the original grievants. (Tr. 183-84) According to Evans, Respondent offered to settle by paying only Braggs and Adams, but the original group objected. (Tr. 183-84). Subsequently, the Company, through then Inbound Manager Don Mouledoux, ultimately offered to spread the money that had been proposed for Adams and Braggs among all the grievants, but this offer was deemed unacceptable by the original grievants. (Tr. 185). Neither Evans nor any other witness provided any clear indication of how this grievance ultimately ended. (Tr. 479-482). There is no evidence that any supervisor or manager criticized Evans for filing this grievance. Evans acknowledged that he had no issues with Mouledoux. (Tr. 484).

On November 15, 2015, Evans filed grievance 2015-17 regarding overtime opportunities not being given by seniority. (Tr. 190-91; GC 5; GC-6). According to Evans, the grievance was filed over a number of issues that employees were complaining about, including overtime opportunities not being given by seniority. Evans testified that the grievance was directed initially to Supervisor Robert Buckingham, but that Mouledoux became involved in the process. (Tr.186-90). The Company answered on January 5, 2016, denying the grievance, and Evans rejected that answer on January 6, 2016. (GC-6). According to Evans, after Mouledoux became involved, the grievance was to some extent resolved, with the Company putting a seniority system in place for

overtime assignments that it used "most of the time." (Tr.190-91). There is no evidence of any animus by Respondent toward Evans based on this grievance.

On May 5, 2016, the Union filed a grievance asserting that Evans had been unjustly issued a 30-day suspension for what was merely an "accident." (GC-34). On May 12, 2016, the Union filed a grievance challenging Evans' intervening termination on May 11, 2016, for directing threatening and abusive language at manager Kevin Bush while Bush was issuing Evans his 30-day suspension. (GC-35). Again, there is zero evidence of any animus on the part of Respondent toward Evans based on the filing of these grievances. Indeed, the record affirmatively reflects that the Company and the Union reached a settlement of these two grievances, which resulted in Evans' reinstatement. (GC-21, 23).

In January 2017, Evans requested that the Union file a grievance about overtime and the seniority list. After Respondent investigated the grievance, a number of employees, including Evans, received compensation. (Tr. 370-371). From the time of his reinstatement in August 2016 until his termination on March 17, 2017, Evans testified that he could not recall any management actions that could be characterized as hostile or retaliatory. (Tr. 565.)

3. Union –Related Activities

Although Evans had numerous issues with the Union's leadership, he did engage in a variety of union-related activities. Evans testified that he became the third-shift alternate committeeman for the Union on or about October 18, 2015. (Tr. 177-79; GC-3). However, there was an internal Union "ongoing battle," and apparently Chris Hudson and Kerrick Adams challenged Evans' role or position. (Tr. 178-79). There is no evidence that Respondent became involved in, or cared one way or the other about, any internal Union politics.

Evans testified that he distributed Union literature throughout his employment, but primarily in 2015 and 2016. (Tr. 191-193, 368-369; GC-9; GC-28). In particular, he distributed packets of literature that are in evidence as GC-9 and GC-28. The literature is largely unremarkable, and primarily addresses generic issues such as Weingarten rights and various political issues. (Tr. 192-194; GC-9; GC-28). As the Judge found, "No supervisor said anything to him about the materials or the distribution. (Tr. 505)."

The Judge further found:

> After Evans returned to work about August 2016 through January 2017, Evans purchased and distributed union t-shirts. (GC Exh. 27; Tr. 505-506.) The shirts had on the front the slogan, 'In solidarity there's unity. There's solidarity in strength,' and the back with the UAW logo. Evans and other bargaining unit employees distributed to union members during breaks and before and after work. (Tr. 366). No supervisor or manager ever commented to Evans about the t-shirts or their distribution. (Tr. 506).
>
> From August 2016 until March 2017, Evans also distributed printed materials to employees during break times or before and after shifts. (See, e.g., GC Exh. 28.) In January 2017, Evans requested the Union file a grievance about overtime and the seniority list. After Respondent investigated the grievance, a number of employees, including Evans, received compensation. (Tr. 370–371.) From the time of his reinstatement in August 2016 until his termination on March 17, 2017, Evans testified that he could not recall any management actions that could be characterized as hostile or retaliatory. (Tr. 565.) No evidence shows Respondent was aware of any of these union activities.

(JD 35: 38-50; 36:1-2).

4. Safety Complaints

In 2015, Evans raised safety issues regarding placement of heavy items on racks in the warehouse. (Tr. 194-200). According to Evans, he had experience with racks from the other Volvo facility where he had worked and he first told inbound supervisor Buckingham and inbound manager Mouledoux, that placing heavy items on the top level of the racks presented a safety issue in the warehouse. Buckingham generally indicated that the racking issue was out of his hands

("above his pay grade") and that higher officials were considering it. Evans acknowledged, however, that the Company was responsive to his concerns and ultimately made changes in an attempt to resolve safety concerns. (Tr.194-201). Specifically, Respondent (1) created a special 3-man loading team for putting away heavy items, (2) placed weight ratings on the racks, and (3) installed heavy-duty, weight bearing beams at one end of the racks for the heavy items. (Tr. 201-202, 491-497). Buckingham testified that Evans, as well as other employees, raised complaints to him about the safety hazard of heavy parts being placed high on racks. As Buckingham considered the complaints to be legitimate, the Company investigated and took steps to change the rack system to resolve the safety issues. (Tr. 767-769). There is no record evidence indicating any animus by Respondent related to Evans reporting safety issues. (Tr. 194-200).

At some point in 2015, Evans filed a complaint with OSHA regarding heavy materials stacked high on shelves, and forklift drivers using telephones and leaving the forklifts blocking aisles. Evans testified that he was notified that OSHA conducted an investigation of the facility. He did not dispute that, by letter dated June 14, 2016, OSHA informed him that it had found no safety violations and that no changes were required in Company operations. (GC-24; Tr. 356-58). Again, there is no evidence that the Company reacted to the OSHA complaint in any way, if at all, other than "business as usual," let alone in any way that would indicate animus against Evans. (GC-24; Tr. 356-358).

5. Miscellaneous Complaints

In October 2015, Evans raised issues regarding third-shift employees not receiving a shift-differential. Evans testified that he raised the issue with Mouledoux at roundtable meetings. (Tr. 202-03). According to Evans, the Company subsequently agreed to institute a third-shift premium and a memo was posted about the agreement for the shift differential between Union officials and

Curt Youngdale, a corporate labor relations manager in Respondent's Greensboro, North Carolina headquarters. (Tr. 202-204, 497-501).

On or about April 12, 2016, Evans wrote a letter to Kevin Bush, also directed to corporate Human Resource Director Tess Thomas in Respondent's Greensboro, North Carolina headquarters, complaining primarily about a DAR he had received for wasting time. (R-1). Evans offered a litany of "defenses" to the allegations, most of which focused on complaints about Leadman Arthur Braggs. In addition to these personal complaints, Evans noted that other employees had issues with Braggs, that Braggs was targeting other employees, that Braggs' conduct with female employees constituted sexual harassment, and that he created a hostile and adversarial working environment. The ALJ, however, found that neither Thomas nor Bush ever read the letter. Thomas simply filed it away, and Bush gave it to the local HR Manager, who never discussed the letter with Evans. (JD 24: 9-33).

6. Disrupting Supervisor and Leadman Meetings

Evans himself did not testify concerning any specific concerns that he raised during pre-shift meetings. However, when supervisor Buckingham and leadman Arthur Braggs testified, they acknowledged that in their view, Evans sometimes disrupted pre-shift meetings by injecting extraneous issues. The record contains no evidence regarding any specific concerns raised by Evans which Buckingham and Braggs viewed as disruptive: Supervisor Buckingham testified that Evans "asked questions basically to incite the crowd" with things, "trying to make things controversial. Things like that." (Tr. 761). As an example, Buckingham testified that there would be a meeting talking about "gap time," and Evans would "go off" talking about, we have this issue, we have that issue, and it was "very disruptive to the team." (Tr. 761-762). These issues sometimes related to alleged violations of rules or the collective bargaining agreement. (Tr. 762). Buckingham

testified that he viewed Evans' safety complaints as legitimate and did not consider them to be disruptive. (Tr. 772-73).

Team Lead Braggs, who the Judge found was not a statutory supervisor, testified that Evans was known to be "cutting up" at employee meetings, "getting loud," speaking out, and "different things like that," including interrupting the meeting." (Tr. 878.) These interruptions were abrupt, and Evans sometimes complained about employee rights and alleged violation of the contract. (Tr. 879.)

7. March 16, 2017 Meeting

On March 16, 2017, Respondent conducted a meeting with employees to announce certain changes to the pre-break buzzer warning system. Plant Manager Onur Orcun conducted the meeting, and Kevin Bush was present. As found by the Judge:

> Several employees asked questions. Oncur [sic] explained that half the warehouse employees wasting 2 to 3 minutes per day added up to a significant amount of wasted production time. When asked whether the rule would be enforced equally or up to management, Oncun [sic] said that management would have discretion over who received discipline. After approximately 15 minutes, Evans asked Orcun if the new system was a change in terms and conditions of employment. When Orcun asked for an explanation of the question, Evans stated, "[U]nder the collective bargaining agreement isn't this a material item that needs to be bargained for, and that a request to bargain needs to be filed or should be filed in regard to this change of past practices and policies." (Tr. 378.) Orcun testified that he recalled Evans raising the terms and conditions of employment. (GC Exh. 63 at 2.) Another employee then asked why this change was happening, especially with the overcrowded conditions in the bathrooms. Others commented that the break rooms did not have enough microwaves. Bush said the change was within management discretion. Evans then said, "Who told you that? Who told you that?" (Tr. 380.) Bush did not answer Evans but argued with another employee.
>
> When the employees were dismissed from the meeting, Evans went into the warehouse, carrying his equipment. Before Evans reached his equipment, Oncur [sic] and Bush walked up to him. Bush said Evans should not be carrying his equipment but have it on.

(JD 36: 21-42; 37: 1-2).

No grievance was filed by any employee or the Union and the Union did not complain about the change or request bargaining. (GC-63). The Judge dismissed the allegation that Respondent unlawfully unilaterally changed the enforcement of the buzzer system. (JD 38: 7-14).

C. Respondent's Disciplinary Rules and Policies

As noted, Respondent maintains published rules of conduct, safety rules, and a progressive discipline policy. (GC-57). The rules of conduct establish a five-step progressive procedure for violations of the first 13 numbered rules of conduct, which generally focus on conduct that is potentially correctable. The five steps are: 1. Verbal Reminder (with a notation to the personnel record); 2. Written Reminder; 3. Written Warning; 4. Disciplinary Layoff (30 days); 5. Discharge. (GC-57). Under the rules of conduct, the "extent of corrective disciplinary action taken for violations of these rules will depend on the seriousness and/or frequency of the violation and the individual's prior disciplinary record." Of the first 13 numbered Rules of Conduct, the following are relevant here:

5. Failure to comply with safety rules, regulations, and common safety practices, to include failure to wear mandatory personal protective equipment and/or uniforms.

8. Wasting time during scheduled working hours.

9. Using abusive language toward any person.

13. Performing careless or poor workmanship.

Rules of conduct 14 through 21, address more serious offenses. Their violation carries a one calendar week disciplinary layoff without pay. As relevant here, Rule 20 prohibits

"Threatening, harassing, intimidating, interfering, or coercing any other employee at any time including brandishing of any instrument with the intent of causing bodily harm. (GC-57).

The Company's safety rules are in evidence as GC-58. They were revised in January 2015 and employees are trained in and know the safety rules. As relevant here, the safety rules include the following directives:

- Do not back into aisles [Applicable for operation of Order Selectors].
- Sound horn at all intersections and when approaching aisle ends.
- Only stable and safely arranged loads should be carried.
- Know the forklift traffic patterns in your facility.
- Treat blind corners as "Stop Signs". Running these stop signs is just as much a hazard as walking into a street with cross traffic.
- Stop at all cross aisles.

(GC-58).

D. Unchallenged DARs Issued To Evans

Evans received error notifications for careless workmanship on October 8, 2015 and again on November 11, 2015. Two days later, on November 13, 2015, Evans again was issued an error notification and was counseled to be more careful in his work. On November 18, 2015, December 4, 2015, December 9, 2015, December 11, 2015, and December 15, 2015, Evans again received error notifications for careless workmanship. The error notifications were issued by different managers in different areas of the facility and in different roles. (Jt- 2, Arb. Tr. 32-34).

On December 18, 2015, Evans dropped an engine to the floor from his Selector equipment. It was "his second incident within the past hour." Supervisor Buckingham investigated the incident and determined that Evans had failed to properly transport a load, failed to report an incident, and

then presented a false statement about how the engine was flipped. As a result, Evans was issued a verbal reminder (Step 1) for violation of Rule 5 (unsafe practices). (GC-10; Tr. 205-07). No grievance or charge was filed. At the hearing, Evans asserted that he did not agree with the DAR and claimed that the engine fell off when he took a turn. (Tr. 207-08).

In February 2016, Evans's supervisor, Arnold Ayikwei, witnessed problems with Evans' performance in placing items in locations in the facility. When asked for an explanation of his conduct, Evans, in a lengthy response, denied responsibility and claimed "there may be a system error in play here." (GC-11; Tr. 216-219). On February 24, 2016, as a result of that problem, Ayikwei issued Evans a written reminder (Step 2) for violation of rule 13, performing careless or poor workmanship. (GC-11; Tr. 216-219). No grievance or charge was filed. At the hearing, Evans testified that he did not agree with the DAR because the Company's location system mixes up Mack and other part locations. (Tr. 217-20).

E. March 2016 – Written Warning for Wasting Time-Step 3

On March 22, 2016, Team Leader Braggs was looking for Evans in order to resolve some discrepancies in the placement of items by Evans, which Braggs had observed in the DPX system. Braggs testified that he found Evans in the break room at approximately 1:35 a.m., well before Evans' scheduled 2:00 a.m. lunch break time. Evans was watching TV. Braggs testified that he reported his observation to Inbound Supervisor Buckingham by email.[2] According to Braggs, he and Buckingham had observed Evans taking unscheduled breaks multiple times prior to this incident. For this day, Evans' work record on the DPX system showed a large period of gap time

[2] Braggs had similarly observed and reported another employee, Tavares King, for precisely the same type of work rule violation on March 4, 2016. (R-3).

between times of logging into the DPX system and recording work -- stopping at approximately 1:32 a.m. and then beginning again at 2:57 a.m. (Tr. 730-31, 763, 843-44, 865, 883, 888, 1062, 1114-15; GC-13 GC-44).

Buckingham testified that he discussed the matter with Braggs, and that they reviewed Evans' put-away records, which reflected that his last put-away was at 1:31 a.m. Buckingham testified that at that time of the morning, there was little traffic in the plant and that in his opinion, Evans could have reached the break room in 4 minutes. As a result of Braggs' report from Evans, the extensive gap time prior to break, and the fact that Evans had been coached on prior occasions, Buckingham issued Evans a written warning (step 3), for violation of Rule 8, wasting time during scheduled work hours. (Tr. 723, 735-36, 749, 754-55, 774-75). The written warning noted that Evans "was in the front break room 25 minutes before Lunch sitting down watching TV." The warning is dated March 22, 2016, but was signed by Buckingham and Evans on March 23, 2016. (GC-12). On the written warning, Evans wrote a lengthy response to the warning. He noted that he had requested and received a copy of his put-away records, which reflected that his last put-away was at 1:31 a.m. Evans disputed that he could have walked to the break room in 4 minutes time. Evans, however, made no mention of any other employees being in the break room at the same time.

During the hearing before Judge Steckler, Evans testified that he was not in the break room at 1:35 a.m. and that Braggs was lying. Evans acknowledged being in the break room early, at about 1:54 to 156 a.m. However, he denied that he was watching television. According to Evans, he was getting water and there were 10 to 15 other employees in the room. (Tr. 235-238). Evans acknowledged that the lunch break was from 2 to 2:30 a.m., and that after the lunch break was over, the DPX log did not show work again until 2:57 a.m. Evans claimed that this was because

he had to walk back to his equipment and then remove plates and skids and possibly do some "emballage" work. (Tr. 236).

The record reflects that on March 31, 2016, Evans, along with a Union representative, met with manager Kevin Bush in an effort to challenge his written warning. During the meeting, Evans acknowledged being in the break room early (1:54 a.m.) after using the restroom. Bush explained the 30-minute lunch period and the break and lunch bells. Bush told Evans that he should advise the leadman or supervisor if he was delayed in the put-away process. Evans requested a copy of his performance for the previous 30 days. Bush agreed to provide this information, but declined to remove the warning. (Tr. 1011-1014; Jt- 3, Co. Exh. 5). Following this meeting, Evans sent Bush a letter referencing his put-away records and again challenging Braggs' statement that he was in the break room at 1:35 a.m. In this letter, Evans asserted that he was in the break room at 1:51 a.m. Evans made no mention in this letter of any other employees being in the break room. (GC-14).

At some point, Bush discussed the warning with supervisor Buckingham, and he looked at the computer report for March 22. (GC-13). This report reflected that Evans made a put-away at 1:31 a.m. and did not make another put-away until 2:57 p.m. Bush testified that this was an excessive amount of gap time. (Tr. 1102-1105).

Numerous other employees have been disciplined for "wasting time." (GC-38).

F. May 2016 – Initial 30-Day Suspension for Safety Rule Violation.

On April 21, 2016, Evans was moving a pallet containing windshields when he dropped the pallet to the floor, thereby causing damage to the windshields. (GC-18; Tr. 319-21, 1018-21). Supervisor Ayikwei investigated the incident and concluded that Evans had acted negligently and unsafely in lifting the load, thereby violating rule 5. (GC-16; GC-18; Tr. 1018-21). Evans denied that he had acted unsafely and contended that it was an unavoidable accident. (Tr. 319-23, 337).

Ayikwei, who is of African heritage and has a thick accent, wanted Bush to be present when the DAR was issued to Evans. As Bush was on vacation at the time, the meeting with Evans did not occur until May 3, 2016. At that time, Bush met with Evans and Union representative Roderick Simpson and issued a Step 4, 30-day suspension for the incident.

G. May 2016 – Initial Termination for Abusive and Threatening Language.

On May 3, 2016, as they stepped out of the meeting into the open Main Office, a heated exchange occurred between Evans and Bush in the presence of Simpson and Candid Patino, a contract security guard. (Tr. 288, 980, 1026-29; Arb. Jt-3, Co-8 at 59, 65). Evans disputes making any threats, but admits that he said something to the effect of, "the reason things are all fucked up around here is because of people like you." (Tr. 339-44). Bush testified that Evans used profane language and that there was a threat included. (Tr. 1025, 1028, 1084, 1087-92). Patino, in a written statement provided shortly after the incident, (JX-3, CX8; T. 985-90), wrote:

> I am writing this statement on the suspension on today of Walter Evans. I witnessed Kevin Bush having a meeting with Walter Evans explaining to him his suspension. Upon dismissal, Walter Evans became very upset. He started cursing and pointing his finger at Mr. Bush. Walter Evans stated that this isn't over, you think you can get away with this this, no I'm going to get your ass. You think you can do this shit and get away with it. I will see you in court. Better yet, I will see you in 30 days and we will handle it then. I'm going to get your ass. He was asked to leave the property. He continue to say these things as he walked out and that he wanted to file a grievance now. He was very upset and in a rage. He left the property and stated this over again while leaving.

The Judge resolved the credibility dispute regarding this incident in Respondent's favor, finding that "Evans made the documented threats, noted by Patino,[3] and that Evans told Bush he had 'no fucking integrity' exiting the conference room." (JD 32: 33-36).

[3] These included threats to "get your ass." (JD 4: 1-3).

Bush promptly reported the incident to Youngdale and Thomas by email. Company management conducted an investigation of the misconduct and ultimately concluded that Evans had violated Rule 9, using abusive language, and Rule 20, threatening, harassing and intimidating another employee. (Tr. 1082-85, 1087-93; GC-19; GC-48). Two days after the meeting and incident, the Union filed a grievance over the 30-day suspension, contending that the incident was technically an "accident" rather than a safety violation. (GC-34). On May 11, 2016, Respondent notified Evans by letter that his employment had been terminated effective as of May 3 (GC-19): "The purpose of this letter is to notify you that the Company has determined that your words and actions following your disciplinary hearing on May 3, 2016 constitute violations of Work Rules #9, and #20 of the Byhalia CDC Rules of Conduct. Accordingly, in light of your active discipline record, your employment with Volvo is hereby terminated effective May 3, 2016."

On May 12, 2016, the Union filed a grievance challenging Evans' termination, and denying that Evans used abusive language or that he threatened, harassed or intimidated another employee. (GC-35). On June 27, 2016, Evans filed Charge No. 15-CA-179071. In the Charge, Evans asserted that his suspension and termination in May 2016 were in retaliation for his union and/or other protected concerted activities. (GC-1(a)).

H. July 2016 – Grievance Settlement Results In Evans Being Reinstated

The 30-day suspension that was issued to Evans on May 3, 2016, was initiated by Supervisor Ayikwei and was based on his contention that the accident in which Evans dropped a load of windshields was a result of negligent or unsafe conduct by Evans. As it turned out, however, Ayikwei had failed to adequately document any unsafe or negligent act by Evans. On July 8, 2016, the two grievances regarding Evans' 30-day suspension and his termination were heard by Company and Union representatives at the third step of the CBA's Grievance Procedure.

In that meeting, the Union, on Evans' behalf, agreed to the Company offer to (1) rescind the 30-day suspension for the alleged safety violation that resulted in an accident, as the supervisor had failed to document the alleged safety violation, and (2) reduce the termination of employment to a 30-day suspension penalty for the rule 9 and 20 violations. Pursuant to this settlement, Evans was reinstated and placed back at Step 4 of the progressive discipline policy.[4] (GC-21; GC-22; GC-23, GC-24, GC-35; T. 260-64, 288, 1116-17).

I. March 2017-Termination for Backing Out into an Aisle-Step 5

Evans accepted the settlement and was reinstated on August 1, 2016. His employment following his reinstatement was uneventful for almost 8 months. Upon his reinstatement, Evans had been awarded a job in outbound, where he had a different group of supervisors. On the morning of March 17, 2017, however, Evans backed his lift truck out of an aisle and into the middle of the main north-south aisle of the facility in direct violation of the following Safety Rule:

- Do not back into aisles.

(GC-58; GC-29). There is no dispute that Evans violated the safety rule by backing into an aisle. What is disputed is the reason that he did so and whether this was the motivation for his subsequent termination.

The Company witnesses' accounts of the facts are generally consistent and as follows: On the morning of March 17, 2017 at approximately 8:30 a.m., a morning escalation meeting was occurring in the "Pilot Area," which is located near the center of the facility, near the Emballage Area, west of the main two-way north/south aisle. (Tr. 903, 1033-39, 1094, 1110; GC-61). Present

[4] The UAW and the Company also agreed that Evans' official date of reinstatement would be June 3, 2016 and Evans received full back pay. (Arb. CX-10).

at the meeting were inbound manager Bush, inbound team leader Deadrick Simelton, safety supervisor Burt Barton, outbound supervisor Bobby Clark (Evans' immediate supervisor), and quality supervisor Randy Sheeley. As this meeting was taking place, Bush pointed out to the group that an "order selector" was backing out of Aisle 128 and into the main north/south aisle. The observed conduct was "probably less" than 75 feet from the witnesses and their vision was unobstructed. Several of the group recognized that it was Evans backing into the aisle. (Tr. 691, 697-98, 714, 793, 831-36, 837, 1110). Clark, left the group meeting immediately and walked over to speak with Evans. Safety Supervisor Barton followed moments later and immediately took photographs of the aisle with his cellular phone. The photographs were taken looking east down Aisle 128 and showed an unobstructed aisle with only a lift truck on the far side of another north/south aisle. No cones of any type were visible in the aisle. (Tr. 691, 697-98, 700, 1099; Arb. Co-14).

Clark and Bush subsequently approached Human Resource Manager Lonny Otto both before and after a 9:30 a.m. managers meeting. (Tr. 905). They related to Otto what had occurred, and Otto requested that they both provide written statements. Otto then contacted Barton, Simelton, and Sheeley and requested statements from them. (Tr. 701, 717-19, 835-36, 902, 905-06; Arb. Jt-3, Co-16).

Thereafter, Otto contacted Richard Green, First Shift Union Committee Person, and requested that Green bring Evans to his office to discuss the incident. Otto had never met Evans. Green and Evans met with Otto around 11:00 a.m., just before Evans' scheduled lunch break. (Tr. 913-19 Arb. Co-17 & 18). In the meeting, Evans told Otto that instead of Aisle 128 as reported by the managers, he (Evans) had been in Aisle 126, which he claimed was blocked by two other equipment operators. Evans related that he backed out of the aisle because he did not want to create

a further safety incident by blocking someone else's egress from the aisle. Otto requested that Evans provide a written statement. Evans agreed to do so, but asked if it could be after lunch. Otto agreed. (Tr. 913-16).

Following lunch, Evans provided a written statement of his version of events, admitting that he had backed out of an aisle, which he claimed was Aisle 126. (GC-29; GC-30; T. 915-16). Evans asserted that another lift truck in the aisle had flipped an emballage over and the top two sleeves were in danger of falling and that a second lift truck was already trapped between the accident and Evans. He testified that based upon his training, experience and OSHA regulations, he chose to blow his horn and back into the main aisle of the facility. (GC-29; GC-30; Tr. 915-16).

Otto's investigation concluded after speaking with Evans and the other known witnesses, reviewing and considering all written statements, photographs, Evans' Pick Record for March 17, 2017, and walking the area of the incident. (GC-51; Arb. Jt-3, Co-12, 13, 14, 16, 17, 18; Tr. 906). Otto determined that Evans had in fact violated Rule 5 and that discipline was appropriate. (Tr. 964). He prepared his Investigation Summary related to the rule violation that same day, which he submitted to Youngdale and Thomas in corporate headquarters. (GC-51; Tr. 920-23). Otto then reviewed Evans' discipline file and found that Evans was already at Step 4 of the Progressive Discipline Policy as a result of the previous settlement and thus was now facing Step 5, termination of employment. (Tr. 919, 920-23, 929, 963-64).

On the following Monday, March 20, 2017, Evans and Union representative Green were informed of Evans' termination. (GC-31; Tr. 925-26). Neither Bush, nor any other supervisor or manager, had any input into that decision. (Tr. 924-25, 964). Other Byhalia employees have been disciplined for backing out of aisles and other Safety Rule violations involving operation and driving of order selectors and fork lifts. (GC-39, p. 42-45, 70; GC-40; GC-41, pp.1-2; Tr. 811-14,

937-39, 1041, 1096-97, 1102-04). Evans' grievances, charges, and complaints were not a factor in Otto's decision on the discharge. (Tr. 921-22, 928, 963-64).

On March 22, 2017, the Union filed a grievance challenging Evans' termination as a violation of the CBA. (GC-32). On May 26, 2017, Respondent provided its third-step answer to the Union, denying the grievance and asserting that Evans was discharged with just cause. (Arb. Co-21, p. 3). The grievance was not resolved and the Union moved forward to arbitrate the grievance. (R-4).

J. December 18, 2017- Arbitration Award Denying Grievance

On October 4, 2017, the Union and the Company arbitrated the grievance challenging Evans' termination under the CBA. The Company had the burden of proving that Evans was terminated from employment with "just cause." In his decision, the Arbitrator recited the list of disciplinary steps the Company had used for Evans and then concluded as follows:

> … the Arbitrator finds that the Company satisfied its burden of proof showing that Evans violated the safety rule prohibiting backing into aisles, which the Arbitrator concludes is a reasonable rule in light of the potential hazard, in particular considering the large size of order selectors (resembling a massive mutated fork lift) and the damage they could cause. As a result, he finds that Evans violated Rule of Conduct 5. As this was step 5 in the progressive discipline of Evans, his termination was for just cause.
>
> In conclusion, the arbitrator denies the grievance in this case and rules against the union on the issue of whether Evans was discharged for just cause as required by article 19, section 1 of the applicable collective bargaining agreement. To that extent, the union is a loser" within the meaning of Article 20.

(RX-4).

STATEMENT OF ISSUES

1. Whether the Judge's findings that Respondent investigated and determined that multiple other employees were in the break room at the same time as Evans, but chose to discipline Evans alone, and that it admitted to this "blatant disparity," are based on a patent misreading of the record and without any factual support in the record? **[Exceptions 1, 2, 3, 4, 5, 6, 11, 12, 13, 14, 16, 23]**

2. Whether Respondent violated Sections 8(a)(3) and (1) of the Act by issuing Walter Evans a written warning on March 23, 2016? **[Exceptions 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 44, 45, 46, 47]**

3. Whether the Board should defer to the grievance settlement reached between the Company and the Union regarding Evans' initial suspension and termination in May 2016? **[Exceptions 30, 31]**

4. Whether Respondent violated Sections 8(a)(3) and (1) of the Act by suspending Walter Evans on May 3, 2016? **[Exceptions 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 44, 45, 46, 47]**

5. Whether the Board should defer to the arbitration award denying the Union's grievance regarding Evans' termination in March 2017? **[Exceptions 39, 40, 41, 42, 43]**

5. Whether Respondent violated Sections 8(a)(3) and (1) of the Act by terminating Walter Evans on March 20, 2017? **[Exceptions 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47].**

6. Conditionally, whether the Judge erred by applying an *Atlantic Steel* analysis, as opposed to a *Wright Line* analysis, in addressing the lawfulness of Evans' initial termination for threatening language? **[Exceptions 28 and 29].**

ARGUMENT

A. The Legal Framework

The allegations regarding the discipline and termination of Evans' employment arose under sections 8(a)(3) and (4) of the Act.[5] The legal framework is similar under both sections. *Newcor Bay City Division of Newcor, Inc.*, 351 NLRB 1034, n. 4 (2007). The General Counsel is required to establish "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision," at which point, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981). Although sometimes stated in varying terms, the elements of the General Counsel's case include proof that (1) the employee engaged in activity protected by the Act, (2) the respondent was aware of such activity, (3) the alleged discriminatee suffered an adverse employment action, and (4) a nexus exists between the employee's protected activity and the adverse employment action. *Newcor Bay, supra*, 351 NLRB at 1036; *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Proof of animus toward the protected conduct is an essential element in establishing that the challenged action was unlawfully motivated. *Whirlpool Corp.*, 337 NLRB 726, 726 (2002), *enf'd*, 92 Fed. Appx. 224 (6th Cir. 2004).

In analyzing the record evidence, the Board must consider the record in its entirety and not just the evidence that supports the General Counsel. The Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack v. NLRB*, 522 U.S. 359, 378 (1998). The evidence in

[5] The Judge dismissed the §8(a)(4) allegations.

support of a particular conclusion "must be substantial, not speculative, nor derived from inferences upon inferences." *Brown & Root, Inc. v. NLRB,* 333 F.3d 628, 639 (5th Cir. 2003).

"The ultimate burden remains, however, with the General Counsel." *American Gardens,* 338 NLRB at 645 (2002). Thus, "a finding that the General Counsel has met the initial Wright Line burden by making a showing sufficient to support the inference that protected conduct was a motivating factor in [the employer's decision] does not mean that the [decision] was in fact 'unlawfully motivated.'" *Tom Rice Buick,* 334 NLRB 785, n. 7 (2001). Although the employer bears the burden of establishing its "affirmative defense" by a preponderance of the evidence, the evidence that will suffice to establish this defense is not unduly onerous. "Nothing in the Board's Wright Line decision indicates that the employer's burden cannot be met by using circumstantial, as opposed to direct, evidence," *Centre Property Management v. NLRB,* 807 F.2d 1264, 1269 (5th Cir. 1987), and "[t]he Respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it." *Merrillat Industries,* 307 NLRB 1301, 1303 (1992).

B. The Judge's Finding That Respondent Admitted To Blatant Disparity Is Based On a Patent Misreading of the Record and Is Not Supported By Substantial Evidence.

Respondent will address each disciplinary action found by the Judge to be unlawful, and the subsidiary factual findings and conclusions, *infra*; however, because of its pervasive impact upon her decision, and the fact that it is based on a patent misreading of the record, it is appropriate to address one particular finding of the Judge upfront. In particular, the lynchpin of the Judge's finding of animus on the part of Respondent is her finding that Respondent issued a written warning to Evans on March 23, 2016, for being in the break room early, even though it purportedly *admitted that it had investigated and determined that there were multiple other employees in the break room at the same time as Evans and that none of these employees were disciplined*. Thus,

the Judge concluded that Respondent deliberately chose to treat Evans discriminatorily and that there was "blatant disparity" from which animus could be inferred.

The purported *admission,* however, was not an admission at all. It was simply a documentation of a *contention made by the Union Representative during a June 30, 2016 grievance meeting (three months after the written warning in question) involving Evans' subsequent suspension and termination* (GC-36, p. 2). According to the ALJ:

> In a third-step meeting on June 30, 2016, regarding Evans' May 2016 suspension and discharge, [HR Generalist Cynthia] Hayes confirmed that she investigated Evans' claim that others were in the break room with him. Hayes not only confirmed that 8 others were in the break room, she also confirmed that Evans was the only person who received discipline. (Tr. 281–282; GC Exh. 36 at 2.) Despite this revelation, Respondent took no action to change Evans' discipline. (Tr. 282.) Nor does Respondent show any of the others received coachings or other forms of discipline.

(JD 18: 30-36).

These findings of fact are without any evidentiary support. There is no record evidence to the effect that Hayes *confirmed* that *she investigated* Evans' claim that others were in the break room with him. Nor is there any evidence that "Hayes not only confirmed that 8 others were in the break room, she also confirmed that Evans was the only person who received discipline." What the record reflects is that on June 30, 2016, *some three months after Evans' written warning,* a grievance meeting was conducted regarding *Evans' subsequent suspension and termination.* Hayes took minutes of the meeting. (GC-36). During this meeting, Union representative Chuck Davenport made a general contention that Respondent's supervisors were inconsistent in issuing disciplinary actions; i.e., disciplining some employees while overlooking other violations. Shortly thereafter, Davenport, referred back to Evans' March 23 written warning for wasting time, resulting in the following colloquy:

> Davenport: But in the same way when there are 8/9 people in the break room and Walter is the only one written up that's a given fact. They've already investigated and no other employee received discipline. Outside looking in whether it's a love/hate relationship or whatever and you have the authority to issue discipline but management is being discriminatory in the fact that there are 8 people in the room and you only pick one out.
>
> Hayes: Who are the other employees involved? *Roderick [Simpson] referred* to the email I received on 6/30. The others on the list with the exception of Monique Gulledge were in the break room at the same time Walter was in there but Walter is the only employee who was written up.

(GC-36, p. 2) (Emphasis supplied).

Clearly, Hayes was not saying that she personally investigated, much less validated, that there were eight or nine other employees in the break room at the same time as Evans. And it was Davenport, not Hayes, who stated that "they've already investigated" and none of the others were disciplined. Hayes was simply recording a contention being made by the Union. She obviously was unaware of this contention because she asked who these employees were. Union steward Simpson then referenced an email he had sent Hayes that very day (June 30). The email is not in the record, but it apparently contained the names of other employees. Simpson then stated that all of these employees, save one, were in the break room (three months earlier) when Braggs observed Evans. Although Hayes failed to separate Simpson's response from her question, she clearly was noting that she asked who these other employees were to which Simpson responded that he had sent Hayes an email that same day (June 30) containing the names and Evans was the only one disciplined. This was Simpson's contention, not a confirmation by Hayes. Otherwise, Hayes was answering her own question.

The Judge also cites the testimony of corporate Human Resource Director Tess Thomas (Tr. 281-282), but Thomas had no independent knowledge and did nothing more than refer back

to Hayes' minutes of the June 30 meeting. During cross-examination, the following colloquy occurred between Thomas and Counsel for General Counsel:

> Q: So according -- at least according to [Hayes'] notes, there had been some review of employee records and it was determined that, for the incident that Mr. Evans was written up for on March 22nd, 2016, there were, in fact, other employees in the break room at the same time as him, correct?
>
> A: That's what the document states.

The conclusion that the Judge draws from this snippet of testimony, i.e., that Thomas confirmed that Hayes investigated and determined that other employees were also in the break room early, is inconsistent with both the question asked and the minutes themselves. The question posed to Thomas did not ask whether Hayes or any manager or supervisor had investigated Evans' claim that other employees were also in the break room. Instead, the question referred Thomas to the minutes and asked if it had been *determined* that other employees were in the break room. The question did not ask by whom such a determination had been made, nor did it ask whether Respondent had so determined. Thus, the question was ambiguous and deceptive, particularly since the document to which Thomas was referred made no assertion that a concrete determination had been made by anyone, much less by Respondent. In the end, however, Thomas' answer refers only to what the document says and adds nothing to the document itself, which is controlling.

Nothing in Hayes' minutes or Thomas' testimony supports the Judge's finding that Respondent independently investigated and determined that multiple other employees were in the break room at the same time as Evans. Nor does the record as a whole support such an inference. Indeed, except for the April 12, 2016 letter from Evans, (R-1), which neither Bush nor Thomas ever read, *at no point prior to June 30 did either Evans or the Union ever contend that Evans was treated disparately when he was issued a written warning.* Evans penned two statements going to

great lengths to dispute that he was in the break room at 1:35 a.m., as opposed to 1:51 or 1:54 a.m. His defense was purely hyper technical—if the time cited by Braggs was incorrect by even one minute, the warning was invalidated. He accused Braggs of a personal vendetta, but not once in these two statements did he defend on the grounds that there were multiple other employees in the break room at the same time who were not disciplined. (GC-12, GC-14). The contention of disparate treatment first came to Respondent's attention three months after the fact during a grievance meeting concerning a subsequent suspension and termination. Simpson referred to an email he had sent Hayes earlier that day (June 30), which Hayes apparently had not seen. Respondent had no reason, or obligation, to go back and investigate such a tardy contention. The March 23, 2016 written warning was water under the bridge at that point. The issues being addressed in the June 30 grievance meeting concerned Evans' suspension and termination in May 2016, not his earlier DAR in March 2016.

Indeed, the whole disparate treatment issue is a red herring given the competing time lines proffered by Braggs and Evans. Braggs asserted that he observed Evans in the break room at 1:35 a.m. watching television. Evans testified that it was later, after 1:50 a.m. that Braggs observed him, and that Evans was drinking water. It may well be that other employees were in the break room at 1:50 a.m., but that is not when Braggs says he saw Evans. Respondent accepted the information provided by its lead man, which was that he saw Evans in the break room at 1:35 a.m., he was watching television, and no one else was in the break room at the time. And Evans made no contention at the time that other employees were also in the break room. There was no issue pending regarding whether other employees were also present.

Further, even if Braggs provided misinformation to Respondent regarding the time that he observed Evans in the break room, or whether other employees were present, this would do nothing

to establish blatant disparity. Braggs, as found by the Judge, was neither a supervisor nor an agent of Respondent, and his knowledge cannot be imputed to Respondent. Based on Braggs' email to Buckingham, and the absence of any such contention by Evans, Respondent had no reason to believe that any employee other than Evans was present in the break room.

The Judge's patently erroneous finding that Respondent admitted that it treated Evans disparately in issuing the March 20, 2016 written warning colored her entire decision and led to multiple unsupported findings and conclusions:

> The ALJ discredited Braggs because "[h]e also reported that Evans was alone, when both Respondent's and Union's subsequent investigations revealed eight other workers were in the break room with Evans." (JD 20: 9-11).
>
> "Hayes' report on June 30 confirms that others were in the break room with Evans. Braggs therefore is discredited that no one else was with him when he saw Evans in the break room. With the corroborating evidence and the bargaining notes from Hayes, I credit that Evans was not in the break room alone." (JD 21: 1-5).
>
> "Thomas admitted adverse information about Respondent's failure to act upon learning that Evans was the only person disciplined while others were present in the break room. I generally credit her testimony about this information." (JD 21: 19-21)
>
> "Respondent blindly went forward with the discipline, even after it discovered Evans was not the only person in the break room early but was the only one who received discipline. Respondent let the discipline stand and took no action to step back from the written warning. Respondent refused to correct its error, showing discriminatory intent." (JD 22:45-50).
>
> "If Buckingham's animus towards Evans was not enough by itself, this chain of events demonstrates disparate treatment." (JD 23: 1-2).
>
> "In applying the law of 'blatant' disparity here, Evans received discipline while eight others received no discipline or counseling. This disparity is obvious and conspicuous, leading to the conclusion that animus led to Respondent's decision to discipline Evans. Respondent, having uncovered exculpatory evidence, decidedly ignored it. (JD 23: 23-26).

> "Respondent cannot rely upon only one prong of the disciplinary action, the claimed delay in working after the break, when it did nothing to remove the discipline it knew to be incorrect and disparate." (JD 23: 49-51).

All of these findings are without support in the record. There is no evidence that Respondent "uncovered exculpatory evidence" or "decidedly ignored" such evidence, or that there was any "disparity" leading to a conclusion that "animus led to Respondent's decision to discipline Evans." A "blatant" disparity is a disparity of such proportion "as to admit of no other interpretation than that the employer bore animus against the protected activity." *Tomatek, Inc.*, 333 NLRB 1350, 1364 (2001). It is disparity that is "completely obvious, conspicuous, or obtrusive especially in a crass or offensive manner." *Merriam-Webster's Online Dictionary*. The Judge clearly erred in finding blatant disparity, and this finding tainted many of her other findings and conclusions regarding subsequent disciplinary actions issued to Evans. [6]

C. Respondent Lawfully Issued A Written Warning To Evans On March 23, 2016.

The Judge's conclusion that the written warning issued to Evans on March 23, 2016, was in retaliation for Evans' protected Section 7 activities is fatally flawed in numerous respects. As discussed in detail, her finding that Respondent admitted to blatant disparity is patently incorrect. But there are other flaws in her analysis. Contrary to the Judge's findings, the General Counsel failed to establish even a prima facie case under *Wright Line*, and to the extent that a prima facie case was established, Respondent established its affirmative defense.

In finding that the General Counsel had established a prima facie case regarding this written warning, the Judge referenced the following activities by Evans: (1) union activities (JD 22: 30);

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[6] These are discussed hereafter.

(2) complaints regarding safety and overtime, (JD 22: 31); and (3) concerns, some of which invoked the collective bargaining agreement, raised by Evans in pre-shift meetings that Supervisor Buckingham and Leadman Braggs viewed as disruptive. (JD 22: 31-43). With respect to the first two types of activities, the Judge made no specific findings of animus by Respondent toward such activities. Indeed, the Judge found that Respondent lacked any knowledge of Evans' "union" activities, and the record reflects that Respondent was responsive to, and sought to address, all safety concerns raised by Evans. [7]

Perhaps recognizing the absence of any probative evidence of animus by Respondent toward Evans' union activities and his safety complaints, the Judge primarily focused on the concerns raised by Evans during pre-shift meetings conducted by supervisor Buckingham and Leadman Braggs. In the Judge's view:

> Buckingham's concerns about Evans interruptions and "cutting up" show knowledge and animus. Respondent's annoyance with Evans does not mean he did not present concerns rooted in the collective-bargaining agreement: Buckingham testified that Evans raised many different concerns, some of which were rooted in the collective-bargaining agreement.

(JD 22: 37-40).

The Judge thus applied an *Interboro* [8] theory of protected concerted activity based on Evans' purported invocation of rights under the collective bargaining agreement, which caused

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[7] Further, while Evans' union activities are clearly protected by Section 7, his safety complaints were neither "concerted" nor for "mutual aid or protection." Initially, in raising these safety issues, Evans did not purport to rely upon any provision of the collective bargaining agreement. Nor did he discuss these issues with other employees or seek to initiate group activity. *Allstate Maintenance, LLC*, 367 NLRB No. 68 (2019).

[8] *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), *enf'd,* 388 F.2d 495 (2d Cir. 1967).

consternation on the part of Supervisor Buckingham. There are two critical problems with the Judge's findings and her reliance on an *Interboro* theory of protected concerted activity. First, the General Counsel failed to establish any *specific rights* asserted by Evans that were reasonably rooted in the collective bargaining agreement. Second, the General Counsel failed to establish *animus in any legal sense* by either Buckingham or Braggs, or any connection between Evans' expressed concerns and any subsequent disciplinary action.

The record evidence is woefully insufficient to establish that Evans engaged in any protected concerted activity whatsoever during these pre-shift meetings. Evans himself did not testify concerning any specific concerns that he raised during these meetings. Rather, this evidence came up when both Buckingham and Braggs testified generally to their view that Evans disrupted meetings by injecting extraneous issues. The record, however, contains no evidence regarding any specific concerns raised by Evans which Buckingham and Braggs viewed as disruptive. Supervisor Buckingham testified that Evans "asked questions basically to incite the crowd" with things, "trying to make things controversial. Things like that." (Tr. 761). As an example, Buckingham indicated that there would be a meeting talking about "gap time," and Evans would "go off" talking about, we have this issue, we have that issue, and it was "very disruptive to the team." (Tr. 761-762). Buckingham testified that sometimes Evans was talking about alleged violations of rules or the collective bargaining agreement, but he was not asked and did not provide any specific details. (Tr. 762). Buckingham did testify that he viewed Evans' safety complaints as legitimate and did not consider them to be disruptive. (Tr. 772-73).

Team Lead Braggs, who was not a supervisor, testified that Evans was known to be "cutting up" at employee meetings, "getting loud," speaking out, and "different things like that" including interrupting the meeting. (Tr. 878.) The interruptions were abrupt and Evans sometimes

complained about employee rights and the Company violating the contract. (Tr. 879.) Again, however, Braggs was not asked and provided no details concerning any specific complaints by Evans.

The General Counsel's burden of proof is not satisfied merely by alluding to generalized complaints. After all, not every complaint or concern raised by an employee, even those that may be "rooted" in a collective bargaining agreement, fall within the scope of Section 7's protection. In order to be protected, "the employee's statement or action [must be] based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action [must be] reasonably directed toward the enforcement of a collectively bargained right." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984). "[T]he question of whether an employee is engaged in concerted activity is a factual one based on the totality of the record evidence." *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. *Prill v. NLRB (Prill II)*, 835 F.2d 1481 (D.C. Cir. 1987). The General Counsel must establish a specific complaint and a specific factual context; else, there is no means of ascertaining whether the employee reasonably believed that the employer was violating the collective bargaining agreement in some respect or that the employee's complaint was reasonably directed at enforcing the contract. The Judge inverted the burden of proof: "Respondent's annoyance with Evans does not mean that he did not present concerns rooted in the collective-bargaining agreement." (JD 22: 38-39). Respondent, however, was under no burden to establish that Evans' concerns were *not* based on any reasonable belief of a contractual violation and were *not* reasonably directed toward contract enforcement.

The most that the record establishes is that Evans raised a host of undefined concerns during pre-shift meetings and that he sometimes referenced the collective-bargaining agreement.

The General Counsel failed to establish that Evans engaged in any specific protected concerted activity in these meetings. It is not proper to assume, as the Judge did, that because Evans made reference to the collective bargaining agreement, his concerns were inevitably within the scope of Section 7. *See Allstate Maintenance, LLC*, 367 NLRB No. 687 (2019) ("The fact that a statement is made in a group meeting, in a group setting or with other employees present will not automatically make the statement concerted activity). Thus, the General Counsel's prima facie case falters because he failed to establish any specific protected concerted activity to which the March 23, 2016 written warning could rationally be connected.

But even if it could somehow be said that Evans sometimes made statements during these pre-shift meetings that fell within the protection of Section 7, the record fails to establish animus in any legal sense. There is no allegation that supervisor Buckingham or leadman Braggs threatened Evans or criticized him for raising concerns during these meetings. The Judge's finding of animus is rooted solely in the following findings:

> Evans' speeches in pre-shift meetings caused employees in the meeting to become riled up. Buckingham found Evans' behavior disruptive and that Evans later twisted statements. Some of these issues were related to the collective-bargaining agreement. (Tr. 762–763, 879.) Buckingham and Braggs discussed Evans' conduct in the meetings, saying Evans was "cutting up" in the meeting, getting loud and speaking out, and interrupting the meeting. (Tr. 878.) Braggs testified that Evans was always complaining about employee rights and would talk about it to anyone who listened. Evans participated in round table discussions with the same sort of results: His managers expressed displeasure that their meetings were interrupted.

(JD 14: 29-36).

Being displeased or annoyed that an employee constantly interrupted meetings to raise off-point issues, which caused employees to be "riled up," [9] is not the equivalent of legal animus. No individual who is conducting a meeting is going to be pleased that someone constantly interrupts the meeting to raise issues off the topic. Mere annoyance does not equate to anger. Animus is "a usually prejudiced and often spiteful or malevolent ill will." https://www.merriam-webster.com/dictionary/animus. It is an intense dislike that bodes a willingness to retaliate. There is nothing in the record to suggest that Buckingham harbored such ill will toward Evans as to cause him to impose unjust discipline. Further, whatever annoyance Buckingham experienced was not with the substance of Evans' concerns, but with the fact that he injected these concerns at inopportune times during meetings about completely unrelated topics. This does not rise to the level of animus toward protected concerted activity.

By way of comparison, the Judge was clearly (and legitimately) annoyed by Evans' behavior during the hearing—adding extraneous information to answers, getting off topic, engaging in "rambling tangents", angry muttering, becoming angry and verbally hostile, raising voice, insisting upon having the last word. (JD 19: 28-38; 31: 1-4). But the Judge's annoyance with Evans did not equate to animus toward him. As the Judge noted, Evans' behavior in the courtroom "lent credence to Respondent's witnesses' exasperation with Evans' speeches at meetings and observations in the workplace." (JD 19: 37-38). Exasperation does not equal legal animus.

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[9] The Judge references a definition of "rile" as "to make agitated or angry." (JD 14: n. 6). But it is not at all clear that the anger or agitation to which Buckingham referred was agitation in support of Evans, as opposed to agitation that Evans was once again interrupting a meeting. Further, it was the other employees, not Buckingham or Braggs, who became agitated.

Also missing is any basis for concluding that the timing of the March 23, 2016, warning is such that animus can be inferred. Evans' penchant for interrupting meetings dated back to his transfer to the Byhalia facility in mid-2015. As noted, the most that the record reflects is that at *some* pre-shift meetings, Evans voiced concerns that made some reference to the collective bargaining agreement. We do not know which meetings. Paragraph 7 of the third consolidated complaint alleges that Evans made safety complaints at meetings on August 31, October 8, and December 9, 2015. Evans himself placed no specific dates on his complaints. Assuming that Evans made protected complaints at pre-shift meetings, there is nothing in the record that would support a finding that such protected complaints were made in close proximity to the March 23, 2016 written warning. Indeed, there is zero evidence of any animosity by Respondent toward Evans' safety complaints, which Respondent investigated and made appropriate corrections.

The other grounds cited by the Judge as support for her conclusion that the March 23, 2016 written warning was discriminatorily motivated are equally without merit. As discussed above in great detail, the Judge's finding of "blatant disparity" is based on an obvious misreading of the record. Further, the Judge repeatedly mischaracterizes the written warning as one for being in the break room early. That is not the violation cited in the warning. Rather, the warning, on its face, was for "wasting time." Evans had "gap time" of 28 minutes before his break and 27 minutes after his break.

The Judge asserts that the gap time issue is a "shifting defense." But again, this is neither factually nor legally supported by the record. Initially, there was no "shift" in position. The written warning itself reflects that it was for a violation of Rule 8, "wasting time." This is a distinct violation from leaving early for break. Of course, there is an overlap between the two rules, but they are not identical. Rule 8 does not turn on where the employee is or what he is doing, provided

that it is during working time. There is no meaningful difference between saying that Evans had excessive gap time and saying that he wasted work time.

Second, a "shifting defense" usually refers to taking a different legal or factual position before the Board than the employer relied upon at the time of the discipline. It does not typically (and should not) refer to giving the employee multiple reasons for a disciplinary action. Thus, even if it could be said that Bush's reference to "gap time" added some new element to what the supervisor had written on the warning, so what. Bush was Buckingham's manager, and Evans had challenged the discipline. Evans specifically raised the issue of the DLX records in an effort to establish that he was not in the break room as early as Braggs had reported. When Bush reviewed the records, it became apparent that they showed that Evans did not merely waste work time before break; he also wasted working time after break. There was no charge pending at the time, and the litigation position taken by Respondent is exactly the same position it stated to Evans at the time. There was no "shifting defense."

In summary, Evans admittedly was in the break room early. He admittedly had been coached about this problem on multiple occasions. His leadman, who was neither a supervisor nor an agent of Respondent, reported his difficulties in finding Evans to his supervisor. There was no contemporaneous protected activity by Evans, and no plausible evidence of legal animus. If in fact, there were other employees in the break room at the same time as Evans, this was not what Braggs had reported. In short, there is no basis on which to connect the March 23, 2016 written warning to any specific protected activity by Evans. Accordingly, the Judge erred in finding that the General Counsel established a prima facie case.

Assuming, arguendo, that a prima facie case was made out, for all the reasons stated above, Respondent carried its burden of establishing its *Wright Line* defense. While there may be other

ways of establishing the *Wright Line* defense, the most common means is by proof of a good faith belief that the employee violated an established rule or policy and either (1) proof that the rule or policy permitted discipline, coupled with the General Counsel's failure to establish meaningful Section 7 disparity, *The Fresno Bee*, 337 NLRB 1161 (2002) (employer established *Wright Line* defense by establishing that employee violated established no-sleeping rule that provided for "disciplinary action and/or termination," even though no evidence of past practice); *Tom Rice Buick, Pontiac & GMC Truck, Inc.*, 334 NLRB 785 (2001) (employer established *Wright Line* defense, despite strong prima facie case, by presenting evidence that employee violated generally known (but unwritten) policy against leaving early without notification and General Counsel offered no evidence of disparity), or (2) proof that the rule or policy had been relied on in the past to discipline employees, coupled with the General Counsel's failure to establish meaningful Section 7 disparity. *Merillat Industries, Inc.*, 307 NLRB 1301, 1303 (1992) ("In the absence of countervailing evidence, such as that of disparate treatment based on protected activity, the Respondent met that standard by demonstrating that it has a rule requiring discharge for attempting to remove property of the Respondent from the plant without permission, and that the rule has been applied to employees in the past"); *A&T Manufacturing Co.*, 276 NLRB 1183, 1184 (1985) (same), *enf'd pert. part*, 738 F.2d 148 (8th Cir. 1984). Here, Respondent maintains a written disciplinary rule prohibiting employees from "wasting time." Based on Braggs' report to Buckingham and the DLX records, Respondent reasonably believed that Evans had wasted an excessive amount of work time. The record contains numerous disciplinary actions issued to other employees for "wasting time." (GC Exh. 38). While the Judge attempted to "nitpick" these disciplines, the fact remains that employees have been disciplined for the same rule violation as Evans. Respondent established its affirmative defense. Respondent requests that this allegation be dismissed.

D. Respondent Lawfully Suspended Evans For 30 Days On May 3, 2016.

Once the allegation regarding the March 23, 2016 written warning disappears, much of the Judge's analysis regarding subsequent disciplinary actions issued to Evans falls apart. Indeed, much of the Judge's analysis piggybacks on her erroneous finding that Respondent admitted to blatant disparity in issuing the March 23 warning. No such admission was made, and no disparity at all was established, much less a blatant disparity.

There are two aspects to the May 3, 2016 suspension issued to Evans. The initial suspension itself was based on the assertion by supervisor Ayikwei that Evans had acted negligently in dropping a load. The Judge found that this assertion was factually unsupported and that it was motivated by animus toward Evans' prior protected activities. As the Judge acknowledges, however, following the filing of a grievance by Evans, the Respondent agreed with the Union that there was inadequate factual support for the alleged rule violation, and the parties agreed as part of a grievance settlement to rescind the alleged violation and associated suspension. As a result, Evans was reinstated.

1. <u>The Board Should Defer To The Grievance Settlement.</u>

Respondent contends that the Judge erred by declining to defer to this grievance settlement. The Board's current standards for deferral are in a state of flux. Historically, the Board has a policy of deferring to arbitration awards, *Spielberg Mfg.* 112 NLRB 1080 (1955) and *Olin Corp*., 268 NLRB 573 (1984), as well as pre-arbitral settlements reached during the established contractual grievance process. *Alpha Beta Co.*, 273 NLRB 1546 (1985), *rev. den. sub nom Mahon v. NLRB,* 808 F.2d 1342 (9th Cir. 1987). Under these decisions, the Board would defer:

> when (1) the arbitration [or grievance] proceedings were fair and regular; (2) all parties agreed to be bound; and (3) the arbitral [or grievance] decision was not repugnant to the purposes and policies of the Act. *Spielberg Mfg.* 112 1080 (1955). Further, the arbitral forum must have

> considered the unfair labor practice issue. The Board deemed the unfair labor practice issue to have been adequately considered if (1) the contractual issue was factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. *Olin Corp*., 268 NLRB 573 (1984). The burden of proof rested with the party opposing deferral.

United Parcel Service, Inc., 2019 WL 1242711 (Case 06-CA-143062) (2019).

Relatedly, the Board deferred to private settlement agreements reached outside the grievance/arbitration process if the settlement agreement satisfied a reasonableness standard. *Independent Stave,* 287 NLRB 740 (1987). The relevant "factors include: (1) whether the parties to the Board case have agreed to be bound, and the position taken by the General Counsel regarding settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) whether the respondent has a history of violating the Act or has previously breached settlement agreements." *BP Amoco Chemical-Chocolate Bayou,* 351 NLRB 614, 615 (2007).

In *Babcock & Wilcox Construction Co.,* 361 NLRB 1127 (2014), *rev. den.,* 873 F.3d 1094 (9th Cir. 2017), the Board modified *Spielberg, Olin,* and *Alpha Beta* in certain respects. Specifically, the burden of proof was shifted to the party arguing for deferral, who would be required to show "that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award." *United Parcel Service, supra.* With respect to pre-arbitral settlements reached during the grievance process, the Board modified *Alpha Beta* to require a showing "that the parties intended to settle the unfair labor practice issue; that they addressed it in the settlement agreement; and that Board law reasonably permits the settlement agreement." The Board left the *Independent Stave* standard

itself untouched. However, in *United States Postal Service*, 364 NLRB No. 116 (2016) (*Postal Service*), the Board held that judges are no longer permitted to accept a respondent's offered settlement terms, over the objection of the General Counsel and charging party or parties, unless the offer constitutes "a full remedy for all of the violations alleged in the complaint." *Id.*, slip op. at 3.

In *UMPC Presbyterian Hospital*, 365 NLRB No. 153 (2017), the Board overruled *Postal Service* and returned to its long standing "reasonableness" standard of deferring to private settlements, initially announced in *Independent Stave.* The Board did not address *Babcock, Spielberg, Olin*, and *Alpha Beta.* Recently, however, in *United Parcel Service, supra*, the Board invited the parties to submit briefs on whether *Babcock* should be modified or abandoned, and if so whether the Board should return to its *Spielberg/Olin* standard, or instead should adopt some different standard. In its request for briefs, the Board did not mention *Alpha Beta.*

Against this muddled background, Respondent contends as follows: (1) The Board should abandon *Babcock* and reinstate the *Spielberg/Olin* standard, which was well understood and accepted for many years. (2) The Board should reinstate *Alpha Beta*, minus the gloss added by *Babcock.* It makes no sense to require that an employer and a union specifically intend to resolve, and specifically address possible unfair labor practice charges, which may or may not be pending at the time of the grievance resolution. The deferral process is founded on a desire to further the peaceful resolution of labor disputes through established grievance procedures. Requiring the parties to specifically mention unfair labor practices that may or may not have been alleged is inconsistent with that goal.

With this background, it is clear that deferral is warranted under *Alpha Beta.* As noted, although the initial suspension was rescinded, Evans was subsequently terminated for a separate

violation. A grievance was filed over this termination, which was consolidated with the suspension grievance during the grievance process. As part of the agreement to rescind the initial suspension, the parties agreed that the termination for abusive and threatening language should be reduced to a 30-day suspension. Thus, the parties agreed to remove the 30-day suspension for dropping a load, and to convert Evans' termination to a 30-day suspension, which placed him at the fourth step of the progressive discipline policy. Inasmuch as the Judge found that the termination (later reduced to a 30-day disciplinary layoff) itself was not unlawful, it is clear that the remedy for the initial 30-day suspension—which completely eliminated the initial suspension—was itself a complete remedy. Indeed, even if the Board were not to defer, the result would be the same.

Here, the settlement reached, without question, is reasonable and warrants deferral by the Board. Although the General Counsel opposes deferral, both the Union and Respondent agreed, and Evans himself accepted the settlement at the time. There was no fraud, coercion, or duress, and Respondent has no history of violating the Act. In fact, Respondent has a positive relationship with the Union and a stable collective bargaining relationship. Moreover, the remedy provided was clearly reasonable, as it was effectively a full remedy. Thus Evans was reinstated and paid backpay.

Given the full remedy provided, there is no plausible basis for the Board to disregard this settlement and impose its own remedy, which with the exception of a notice posting, would be identical to the remedy agreed to by the parties.

2. Respondent Lawfully Suspended Evans

Even if the Board were to decline to defer, it would not alter the fact that the suspension for negligently dropping a load was wiped from Evans' record. It thus seems pointless to argue the original lawfulness of this suspension. In any event, there is no evidence of animus toward Evans on the part of supervisor Ayikwei, who was solely responsible for determining that discipline

should be issued. Although he failed to adequately document any unsafe act on the part of Evans, this does not equate to animus. If this were so, every time an employer resolved a grievance by rescinding a disciplinary action because of some investigative failure, animus could be inferred. Supervisors are human, and they sometimes make honest mistakes. As far as can be determined, there were no significant issues between Evans and Ayikwei. And for the reasons discussed above in conjunction with Evans' prior written warning, there are no specific acts of protected concerted activity by Evans to which this discipline can be connected. The most the record reflects is that the disciplinary action was "unfair," which is why it ultimately was removed. Unfairness by itself, however, is not an unfair labor practice. Respondent requests that this allegation be dismissed.

E. Respondent Lawfully Terminated Evans On March 17, 2017.

With respect to Evans' termination on March 17, 2017, the initial question posed is whether the Board should defer to the arbitrator's award which denied Evans' grievance challenging his termination. Only if deferral is inappropriate does the Board address the merits of the alleged unfair labor practice.

1. The Board Should Defer To The Arbitrator's Award. [Exceptions 39, 40, 41]

As noted above, Respondent contends that the Board should abandon *Babcock* and reinstate the *Spielberg/Olin* standard. Because this issue is being addressed in *United Parcel Service*, Respondent will not argue in detail why *Spielberg/Olin* should be reinstated, but will address the issue both under *Babcock* and *Spielberg/Olin* (or some close variation).

Initially, it seems clear that, at a minimum, under any legal standard, the Board must defer to the arbitrator's findings of fact, particularly where based on credibility. *Aramark Services, Inc.*, 344 NLRB 549, n. 1 (2005) (Board based analysis on arbitrator's findings of fact; "The judge incorrectly rejected the arbitrator's credibility findings and substituted his own.") The Board does

not first determine the merits of the unfair labor practice allegations and then contrast that determination with the arbitrator's award. *Texaco, Inc.*, 279 NLRB 1259, 1259 (1986). Instead, the Board analyzes the arbitrator's decision on its face. Here, the arbitrator discredited Evans' testimony that he backed out of aisle 126 because it was blocked, and instead credited the Company's witnesses' testimony that he backed out of aisle 128, which was not blocked. Thus, he found that the Company established that Evans violated a specific safety rule and that there was just cause for his termination. This is critical because it removes any possible justification for Evans' actions. Thus, the rule violation is established.

"The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues such as that involved here." *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390, 391 (2006). Thus, the burden of a party opposing deferral has been characterized as a "heavy" one. *Aramark Services, Inc.*, 344 NLRB 549, 550 (2005). But even if the burden rests on the party seeking deferral, that burden is easily met here. It is undisputed that the arbitral proceedings were fair and regular and that the parties agreed to be bound by the arbitrator's decision. Although the arbitrator declined to make any specific unfair labor practice finding, the contractual issue was factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Also, the collective bargaining agreement includes a "just cause" provision, which even under *Babcock*, authorizes the arbitrator to decide the issue. It was the Union that caused the arbitrator not to decide the unfair labor practice. The only remaining question is whether his award is repugnant to the Act. This question must be answered in the negative. In *Olin*, the Board made clear:

> [W]ith regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board

> precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

268 NLRB at 574.

In *Olin,* the Board agreed with criticism leveled by the United States Court of Appeals for the Ninth Circuit in *Douglas Aircraft Co. v. NLRB,* 609 F.2d 352, 354-355 (9th Cir. 1979) regarding "[o]verzealous dissection of opinions by the NLRB, as well as by courts," and with the court's observation that:

> If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was "clearly repugnant" to the Act. Nor can it be said that such an award was "palpably wrong," . . . . The reasoning, if ambiguous, could have been interpreted in a non-repugnant way, and should have been in order to give arbitration the "hospitable acceptance" necessary if "complete effectuation of the Federal policy is to be achieved." [citations omitted].

Olin at 575 and n. 11. *See also, NLRB v. Pincus Brothers, Inc.,* 620 F.2d 367, 377 (3d Cir. 1980) ("where there are two arguable interpretations of an arbitration award, one permissible and one impermissible, the Board must defer to the decision rendered by the arbitrator.")

Here, there is nothing remotely repugnant to the Act in the arbitrator's award. He found that Evans backed out of an aisle in direct violation of a safety rule and that this violation warranted termination under the just cause provisions of the contract. This is not a case in which the arbitrator found that the employee engaged in misconduct during the course of otherwise protected conduct and that the misconduct constituted "just cause" for discharge. No one contends that Evans was engaged in protected conduct when he backed out of the aisle. In the arbitrator's opinion, the discharge was founded solely and exclusively on a clear safety violation. The Judge finds the award repugnant to the Act only by substituting her own view of the facts for that of the arbitrator. This is clearly inappropriate.

Respondent requests that the Board defer to the arbitrator's award and that it dismiss the allegation that Respondent unlawfully terminated Evans on or about March 17, 2017.

2. Respondent Lawfully Discharged Evans Based On A Clear Safety Violation.

Assuming, *arguendo*, that the Board does not defer to the arbitrator's award, the record nevertheless fails to establish that Evans was unlawfully discharged. As with the prior disciplines, the Judge's finding of animus regarding Evans' termination on March 17, 2017, is based largely on her prior findings of animus with respect to the March 2016 written warning. These findings, however, for the reasons described above, are patently erroneous. As for the Judge's additional findings upon which she based her conclusion that Respondent unlawfully terminated Evans, they too are unsupported by the record.

We start with the fact that Respondent voluntarily agreed to reinstate Evans, and he was in fact reinstated in early August 2016. Further, at Evans' request, he was transferred from the inbound department to the outbound department, where he worked without incident for almost eight months. This extended time period belies any connection between his termination on March 17, 2017, and any protected activities in which Evans may have engaged prior to May 2016. Recognizing this problem, the Judge sought to link Evans' termination to comments he made one day earlier in a meeting being conducted by Respondent. The record, however, affirmatively refutes any connection.

Initially, there is zero evidence that either Orcun or Bush was angered or irritated by Evans' question. Neither commented negatively on the question, and Evans was but one of a number of employees who spoke up in the meeting. Further, there was nothing particularly provocative about Evans' question, which was whether Respondent was required to negotiate the change in the pre-break buzzer system. The only probative evidence of animus is the close timing of the termination

to Evans' question during the meeting. But the Board has declined to rely on timing when there is an intervening event that clearly warrants discipline. Such is the case here. It is undisputed that Evans backed out of an aisle in violation of established safety rules on March 17, 2017; thereby, negating the significance of timing. *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 675 (2004); *Woodruff & Sons, Inc.*, 265 NLRB 345, 347 (1982), *enf'd, sub nom. Scurek v. NLRB*, 717 F.2d 1480 (D.C. Cir. 1983). Indeed, when the termination closely follows a rule violation or act of misconduct that would otherwise warrant discipline, the timing factor actually supports the respondent's contention that the termination was caused by such rule violation or act of misconduct. *Dade Tire Co.*, 244 NLRB 244, 245 (1979).

The manager who observed and initiated the discipline that resulted in Evans' termination was Kevin Bush. However, the matter was investigated by Human Resources Manager Lonny Otto, who made the decision to terminate. It is clear that this investigation was comprehensive and that Evans was given Union representation and the opportunity to present his position. Otto was relatively new to the facility and had never previously met Evans. There is nothing in either the investigation or the record that would establish animus or pretext on the part of Otto.

With respect to Bush, since he was not personally involved in either the investigation or the decision to terminate, the question raised is whether he chose to make an issue of the violation and report it to Otto because of the complaints that Evans raised during the employee meeting one day earlier (i.e., using the safety violation as a pretext), or instead, genuinely reported the matter because it was a safety violation that he personally observed. Respondent contends that the record affirmatively demonstrates the latter.

First, while a number of employees testified that it was common to back out of aisles, they all acknowledged that doing so was a violation of the safety rules and that they never did so in

front of a supervisor or manager. (Tr. 82, 463-466). They most certainly did not do so in front of Kevin Bush. Thus, employee Glenn Dobson testified as follows:

> Q And you obviously know -- is it fair to say that Mr. Bush is a stickler for following the rules?
>
> A Yes.
>
> Q He's not someone that you know to overlook rules, is he?
>
> A No.
>
> Q Okay. And if he saw a safety violation, you would expect that he would act on that violation, would you not?
>
> A I would expect it, yes.

(Tr. 677).

It seems clear that Bush was a tough manager who expected employees to follow the rules. And when he observed a rule violation, including a safety violation, he acted on it. There is simply no basis for finding that Bush reported Evans' violation to Otto because of some animus toward Evans, as opposed to because he did not tolerate safety violations. Indeed, it had been ten months since Bush had had any dealings with Evans.

The Judge purported to discredit Bush's testimony that he had never observed anyone backing out of an aisle prior to seeing Evans do so. (JD 43: 5-8). This was clearly improper. A judge may not convert an absence of evidence that some event occurred into a finding that such event occurred simply by purporting to discredit the only witness with personal knowledge, who denies that such event occurred. This constitutes nothing more than rank speculation and surmise. At a minimum, there must be sufficient evidence in the record to support the drawing of an inference. But here there is no such evidence. In fact, the record evidence described above supports

the opposite inference. Indeed, Glenn Dobson, the witness whom the Judge found most impressive and credible, testified:

> Q Okay. And if [Bush] saw a safety violation, you would expect that he would act on that violation, would you not?
>
> A I would expect it, yes.

(Tr. 677).

In summary, Respondent voluntarily reinstated Evans in early August 2016, and it moved him to a different department to which he had bid. For more than seven months thereafter, Evans worked without incident. No threats or comments regarding any of Evans' activities, which except for some ongoing union activities (unknown to Respondent) were nonexistent. On March 16, 2017, he made what can only be characterized as an innocuous comment in an employee meeting regarding whether the Company had bargained with the Union regarding an announced change in the buzzer system. No threats or derogatory remarks were made to Evans, and he was but one of a number of employees who raised questions or made comments during the meeting. The following day, Evans backed out of an aisle, a clear violation of Respondent's safety rules, and he did so in front of Kevin Bush, a manager who was known to be strict and unforgiving of rule violations. Not surprisingly, Bush reported this violation to the Human Resource Manager, who thoroughly investigated the incident. Evans' version of the events was unconvincing, and Otto concluded that Evans had in fact backed out of the aisle without justification. As Evans was on a final warning at the time, the next disciplinary step was termination. After discussing his findings with corporate management, Respondent terminated Evans.

Respondent contends that the General Counsel failed to establish a prima facie case. But if he did, Respondent easily carried its *Wright Line* burden. Thus, it established that Evans violated a safety rule and that the policy called for discipline. Although the Judge found that no employees

had been disciplined for backing out of an aisle prior to Evans, (GC-41), there is zero evidence in the record that any employee backed out of an aisle in the presence of a supervisor or manager. Her conclusion that because some other employees were issued warnings for backing out of an aisle after Evans was terminated, this was akin to "closing the barn door after the cows were out" and demonstrative of animus is irrational. (JD 43: 30-31). Such an inference could be drawn only if there were evidence that supervisors or managers, and in particular Kevin Bush, had observed such acts prior to Evans doing so, but had overlooked them. The record contains no such evidence.

Further, the Judge took an improperly narrow view of disparate treatment. In her view, the only comparable employees were those who had backed out of an aisle. As noted, there is no evidence that any other employee did so in the presence of a supervisor prior to Evans. More fundamentally, there are many safety rules, of which backing out of an aisle is but one. A violation of any one of these rules constitutes a violation of Rule 5, and the record reflects countless disciplinary actions (both before and after Evans backed out of an aisle) for Rule 5 safety violations. (GC- 39). Respondent clearly took safety very seriously.

Respondent requests that the allegation regarding Evans' termination be dismissed.

F. Conditionally, The Judge Erred By Applying An Atlantic Steel, Rather Than A Wright Line Analysis in Evaluating Evans' Initial Termination.

The Judge correctly found that Respondent lawfully terminated Evans for his threatening behavior toward Bush following the May 3, 2016 suspension meeting. In doing so, however, she analyzed the issue under *Atlantic Steel Co.,* 245 NLRB 814 (1979). Respondent conditionally excepts to the Judge's application of *Atlantic Steel,* rather than *Wright Line.* If no exceptions are filed to the Judge's dismissal of this allegation, this exception need not be addressed.

Under *Atlantic Steel,* the Board determines whether an employee who is engaged in otherwise protected concerted activity forfeits the Act's protection by the manner in which such

activity was carried out. In such cases, there is no question regarding the reason for the termination. The only issue is whether such activity was protected. Here, however, Evans was not engaged in otherwise protected activity. The meeting was solely for the purpose of issuing discipline to Evans. Evans had union representation, but the meeting was not investigatory and no questions were asked of Evans. There was simply nothing concerted about the meeting and Evans was not acting for mutual aid or protection.

But even if the meeting itself was protected concerted activity, the meeting had concluded at the time that Evans engaged in the misconduct that triggered his termination. Everyone had left the meeting and there was no ongoing dialogue. Contrary to the Judge's finding, Evans was not reacting to an unfair labor practice. In these circumstances, Respondent conditionally contends that the appropriate analysis is under *Wright Line*, rather than *Atlantic Steel.*

CONCLUSION

Respondent requests that the third consolidated complaint be dismissed in its entirety.

Dated this 18th day of June 2019.

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CERTIFICATE OF SERVICE

I certify that this day I served the foregoing Brief on the following persons by electronic mail:

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